(9)

No. 90-97

In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

The National Labor Relations Board promulgated a regulation specifying the eight bargaining units that, in the absence of extraordinary circumstances, will be recognized as appropriate for all acute care hospitals. The questions presented are:

1. Whether the regulation violates the provision of Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), that the "Board shall decide [the appropriate bargaining unit] in each case."

2. Whether the regulation is consistent with 1974 amendments to the National Labor Relations Act that extended the Act to nonprofit health care institutions and with statements in the amendments' legislative history admonishing the Board to give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry."

3. Whether the regulation is arbitrary and capricious in mandating the same bargaining units for all acute care hospitals absent a showing of extraordinary circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 899 F.2d 651. The opinion of the district court (Pet. App. 17a-42a) is reported at 718 F. Supp. 704.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1990. The petition for a writ of certiorari was filed on July 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth at Pet. App. 43a-46a, Section 6 of the National Labor Relations Act, 29 U.S.C. 156, is pertinent. It provides:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of title 5, such

rules and regulations as may be necessary to carry out the provisions of this Act.

STATEMENT

1. In 1974, Congress extended the coverage of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to nonprofit hospitals. Pub. L. No. 93-360, 88 Stat. 395. In eliminating the prior statutory exemption for these institutions, Congress found "that improvements in health care would result from the right to organize, and that unionism is necessary to overcome the poor working conditions retarding the delivery of quality health care." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 499-500 (1978). In most respects, the NLRA draws no distinction between hospitals and other employers covered by the Act. However, recognizing that "the needs of patients in health care institutions required special consideration," [1] the 1974 amendments obligate parties to labor disputes in health care institutions to give increased notice of their intention to modify or terminate a collective bargaining agreement, to participate in meetings called by the Federal Mediation and Conciliation Service, and to give advance notice of strikes and picketing. 29 U.S.C. 158(d) (A)-(C), 158(g); see *Beth Israel Hosp.* v. *NLRB*, 437 U.S. at 496 & n. 12, 499.

Congress also considered, but did not enact, a bill that would have specified the bargaining units for health care institutions.[2] As a result, bargaining units in

[1] S. Rep. No. 766, 93d Cong., 2d Sess. 3 (1974) (*reprinted in Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, at 10 (1974) [hereinafter *1974 Legis. Hist.*]).

[2] S. 2292, 93d Cong., 2d Sess. (1973). This bill, which was introduced by Senator Taft but never reported to the floor of the Senate, would have limited health care bargaining units to four groupings (apart from guards, who are entitled by the Act to a separate unit): all professional employees, all technical employees, all clerical employees, and all service and maintenance employees. *1974 Leg. Hist.* 106, 108, 110.

these institutions are determined—as they are for other employers—in accordance with Section 9(b) of the Act, 29 U.S.C. 159(b). This Section provides that the "Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Although no change was made in this provision when it was extended to nonprofit hospitals in 1974, a statement admonishing the Board to give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry" was added to the House and Senate committee reports accompanying the legislation.[3]

[3] S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974) (*reprinted in 1974 Legis. Hist.* 12); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6-7 (1974) (*reprinted in 1974 Legis. Hist.* 274-275). The statement reads in full:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).*

* By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

The addition of this language to the committee reports was part of a legislative compromise. On the floor of the Senate, Senator Taft, the

2. "Section 9(b) of the Act confers upon the Board a broad discretion to determine appropriate [bargaining] units." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). In exercising this discretion, the Board's focus has traditionally been on whether the employees in a proposed bargaining unit share a "community of interest" sufficient to warrant their being included in the same unit. *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). The Board's "primary concern" has been "to group together only those employees who have substantial mutual interests in wages, hours, and other conditions of employment" (Fifteenth Annual Report of the NLRB 39 (1950)), thereby assuring that the designated unit will be cohesive, free of undue conflicts of interest, and capable of effective bargaining. *NLRB* v. *Action Automotive, Inc.*, 469 U.S. at 495.

For approximately ten years following the enactment of the 1974 amendments, the Board adhered to its "community of interest" approach in resolving disputes over bargaining units in health care institutions, while seeking to avoid undue unit proliferation.[4] However, in a large number of cases, the courts of appeals refused to uphold Board

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sponsor of the bill that would have specified bargaining units for health care institutions, stated that this "agreed upon * * * report language" had been "endorsed by labor and management groups" and the Administration. 120 Cong. Rec. 12,944 (1974) (remarks of Sen. Taft) (*reprinted in 1974 Legis. Hist.* 112). See generally Pet. App. 8a-10a.

[4] Some of the principal decisions explaining the evolution of the Board's approach include *Allegheny General Hosp.*, 239 N.L.R.B. 872 (1978), enforcement denied, 608 F.2d 965 (3d Cir. 1979); *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409 (1980); and *St. Francis Hosp.*, 265 N.L.R.B. 1025 (1982).

determinations regarding appropriate bargaining units in those institutions.[5] One group of courts ruled, in general, that the Board should supplement its "community of interest" approach by explaining specifically why each bargaining unit determination was consistent with the nonproliferation admonition in the 1974 committee reports.[6] The Ninth and Tenth circuits held, however, that the admonition precluded use of the "community of interest" approach in the context of health care institutions and instead required the Board to determine whether there was a "disparity of interests" among groups of employees sufficient to justify separate bargaining units.[7]

In 1984, in its decision in *St. Francis Hosp.*, 271 N.L.R.B. 948, the Board adopted a "disparity of interest" approach for determining bargaining units in health care institutions. But on the union's petition for review, the D.C. Circuit held that the Board had erred in concluding that the admonition accompanying the 1974 amendments

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[5] In summarizing the state of the law prior to the promulgation of the regulation at issue, one commentator identified 16 decisions denying enforcement to bargaining unit determinations in the health care context. Note, *The National Labor Relations Board's Proposed Rules on Health Care Bargaining Units*, 76 Va. L. Rev. 115, 131 n.82 (1990).

[6] *E.g.*, *NLRB* v. *Mercy Hosp. Ass'n*, 606 F.2d 22 (2d Cir. 1979), cert. denied, 445 U.S. 971 (1980); *Trustees of Masonic Hall & Asylum Fund* v. *NLRB*, 699 F.2d 626, 633-635 (2d Cir. 1983); *Memorial Hosp.* v. *NLRB*, 545 F.2d 351, 360-362 (3d Cir. 1976); *Allegheny General Hosp.* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979); *NLRB* v. *Frederick Memorial Hosp.*, 691 F.2d 191, 194 (4th Cir. 1982); *Mary Thompson Hosp.* v. *NLRB*, 621 F.2d 858, 862-864 (7th Cir. 1980).

[7] *E.g.*, *NLRB* v. *St. Francis Hosp.*, 601 F.2d 404, 419 (9th Cir. 1979); *NLRB* v. *HMO Int'l/California Medical Group Health Plan, Inc.*, 678 F.2d 806, 810 (9th Cir. 1982); *Presbyterian/St. Luke's Medical Center* v. *NLRB*, 653 F.2d 450, 457-458 n.6 (1981), modified, 688 F.2d 697 (10th Cir. 1982); *St. Anthony Hosp. Systems, Inc.* v. *NLRB*, 884 F.2d 518, 521 (10th Cir. 1989).

was an "independent source[ ] of law" that obligated the Board to adopt the "disparity of interest" test. *International Brotherhood of Elec. Workers* v. *NLRB*, 814 F.2d 697, 715 (1987). Further, although the court remanded to enable the Board to consider whether to adopt the "disparity of interest" approach as an exercise of its discretion, two members of the panel suggested that Congress "implicitly approved the Board's forty-year construction of section 9 to embody community-of-interest criteria" and emphasized that the Board would have to explain any departure from that approach "*adequately*." *Id.* at 711, 712 n.65; see *id.* at 718 (Buckley, J., concurring) (suggesting that the majority's observation had "ominous tones").

3. To bring order to this area, the Board, pursuant to Section 6 of the Act, 29 U.S.C. 156, published a notice of proposed rulemaking to "amend its rules to include a new provision specifying which bargaining units will be found appropriate in various types of health care facilities." *Collective Bargaining Units in the Health Care Industry: Notice of Proposed Rulemaking* (*NPR I*), 52 Fed. Reg. 25,142 (1987). The proposed regulation provided that, except under extraordinary circumstances, appropriate units in acute care hospitals with more than 100 beds would be limited to the following six: all registered nurses, all physicians, all professional employees except registered nurses and physicians, all technical employees, all service and maintenance and clerical employees except guards, and all guards. *Id.* at 25,146-25,148.

When it issued the proposed regulation, the Board noted that its "extensive experience" in processing "hundreds of petitions for health care units" showed that unit requests usually fell into certain predictable groups of employees that "generally exhibit the same internal characteristics, and relationship to other groups of employees, in one health care facility as do like groups of employees at

other facilities." *NPR I*, 52 Fed. Reg. at 25,143-25,144; see *id.* at 25,146-25,148. The Board emphasized, however, that it was embarking upon rulemaking in order to obtain "empirical evidence" that would better enable it "to make an informed judgment as to what units should be found appropriate in the health care industry, because they reflect true community/diversity of interests and do not promote but instead minimize the type of proliferation and interruption of care which concerned Congress in passing the 1974 amendments." *Id.* at 25,145.

The Board explained that in formulating the proposed rule it "kept firmly in mind Congress's admonition against proliferation of health care bargaining units" as well as its belief, expressed in the 1974 amendments, that collective bargaining by health care workers would "improve the quality of hospital care." *NPR I*, 52 Fed. Reg. at 25,146. The Board sought to accommodate these considerations by "limit[ing] the possible units in the various types of establishments to a reasonable, finite number of congenial groups displaying both a community of interests within themselves and a disparity of interests from other groups." *Ibid.*

After promulgating the proposed regulation, the Board conducted a series of hearings at which interested parties were given an opportunity to testify, submit evidence, and question other witnesses. The Board also received numerous written comments. *Second Notice of Proposed Rulemaking* (*NPR II*), 53 Fed. Reg. 33,900 (1988). With the benefit of these submissions, the Board issued an amended proposal and invited additional comments. On April 21, 1989, after reviewing the many comments submitted in response, the Board made further modifications and issued the regulation at issue here. 29 C.F.R. 103.30. See 54 Fed. Reg. 16,336-16,348 (1989).

Based upon evidence acquired during the rulemaking, the Board determined that, in addition to the units first proposed, separate bargaining units should be recognized for business office clerical workers and for skilled maintenance employees. See *NPR II*, 53 Fed. Reg. at 33,920-33,927, 33,933-33,934. Thus, absent "extraordinary circumstances," the final regulation permits recognition of eight specified bargaining units in all "acute care hospitals": all registered nurses, all physicians, all other professionals, all technical employees, all skilled maintenance employees, all business office clerical employees, all guards, and all other nonprofessional employees. 29 C.F.R. 130.30(a).[8] The fact that a disputed unit would include five or fewer employees is an "extraordinary circumstance" requiring resolution through adjudication. *Ibid.* In other respects, the Board has made clear its intention to construe the extraordinary circumstances exception narrowly—in general, to require a showing of circumstances other than those that the rulemaking demonstrated to be insufficient to foreclose adoption of a uniform rule. *NPR II*, 53 Fed. Reg. at 33,932-33,933; see 54 Fed. Reg. at 16,344-16,345.

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[8] Institutions that are primarily nursing homes, psychiatric hospitals, or rehabilitative hospitals are excluded from the regulation. 29 C.F.R. 103.30(f). See *NPR II*, 53 Fed. Reg. at 33,927-33,929; 54 Fed. Reg. at 16,342-16,344, 16,348. The Board determined that the 100-bed limitation contained in the first proposed regulation was not useful because it did not correlate to issues relevant to unit determination and the parties were generally opposed to use of a distinction based on number of beds. *NPR II*, 53 Fed. Reg. at 33,927. The regulation allows the parties to stipulate to a unit not conforming to those set forth, 29 C.F.R. 103.30(d), and provides that, if sought by a union, various combinations of the eight units may be appropriate, 29 C.F.R. 103.30(a). Where there are pre-existing nonconforming units at an acute care hospital, the regulation will be applied insofar as practicable. 29 C.F.R. 103.30(c).

In determining the units that would be recognized, the Board chose not to apply either a strict "community of interests" or "disparity of interests" approach. *NPR II*, 53 Fed. Reg. at 33,905. Rather, it sought to base its bargaining unit determinations on available empirical evidence. Its goal was "to create a reasonable number of units that will realistically reflect pronounced natural groupings to be found in health care facilities: groupings that will not be so large that organizing them is exceedingly difficult, and representing them even harder because of inherent conflicts of interest within the groups; but large enough that unnecessary, repetitious rounds of bargaining are avoided along with such undesirable results as frequent strikes, wage whipsawing, and jurisdictional disputes." *Id.* at 33,905. To that end, the Board canvassed factors similar to those considered under both the "community of interest" and "disparity of interest" approaches. See *id.* at 33,911-33,927; 54 Fed. Reg. at 16,340-16,341.

The Board found no merit in the objections to the regulation on which petitioner relies in this Court. First, the Board rejected the contention that, in directing the Board to determine the appropriate unit "in each case," Section 9(b) of the NLRA precludes adoption of a regulation specifying the bargaining units appropriate in health care institutions. *NPR I*, 52 Fed. Reg. at 25,144; *NPR II*, 53 Fed. Reg. at 33,901; 54 Fed. Reg. at 16,337-16,338. Second, in justifying its final regulation, the Board expressly determined that each of the units it had recognized, and the scheme viewed as a whole, were consistent with the concern expressed in the 1974 admonition. *NPR II*, 53 Fed. Reg. at 33,916, 33,917, 33,918, 33,920, 33,922, 33,926, 33,933-33,934; 54 Fed. Reg. at 16,345-16,346. Finally, the Board found that it would not be arbitrary to prescribe bargaining units for all acute care hospitals. Citing testimony by an industry spokesperson, the Board determined

that diversity among institutions covered by the regulation was not "shown to be sufficiently significant to preclude uniform treatment for purposes of establishing the general contours of appropriate bargaining units * * * in all but truly extraordinary facilities." *NPR II*, 53 Fed. Reg. at 33,903; see *NPR I*, 52 Fed. Reg. at 25,143-25,144.[9]

4. Petitioner American Hospital Association challenged the regulation on its face in a suit filed in the United States District Court for the Northern District of Illinois. The district court concluded that the "in each case" language of Section 9(b) of the NLRA did not foreclose the Board from using rulemaking in determining appropriate bargaining units. Pet. App. 35a. However, the court ruled that the admonition accompanying the 1974 amendments required the Board to "use the means least likely to cause unit proliferation to achieve [its] objective." *Id.* at 38a. Although conceding that the units designated by the Board "are appropriate," the court observed that it could "envision other divisions, perhaps fewer divisions, in the varied health institutions which would be equally reasonable" and thus held that the regulation was not "responsive" to the admonition. *Id.* at 38a, 41a. The court enjoined implementation of the regulation. *Id.* at 42a.[10]

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[9] Board Member Johansen dissented from the orders promulgating the amended proposed regulation and the final regulation. *NPR II*, 53 Fed. Reg. at 33,934-33,935; 54 Fed. Reg. at 16,347. In his view, the "in each case" language in Section 9(b) of the Act forecloses establishing bargaining units through rulemaking and, in any event, rulemaking in this area was not necessary or desirable. *Ibid.*

[10] In the district court, the Board argued that the court lacked jurisdiction to review the regulation, either because (like a Board certification of an appropriate bargaining unit) it is not a final order within the scheme of the NLRA, see *Boire* v. *Greyhound Corp.*, 376 U.S. 473

5. The court of appeals reversed, vacated the district court's injunction, and directed entry of judgment for the Board. Pet. App. 1a-16a. The court of appeals rejected petitioner's contention that Section 9(b) of the NLRA mandates "that the Board must determine the appropriate unit on a case by case basis, except for the irreducible minimum of three units authorized by the statute itself." Pet. App. 6a. Citing several alternative interpretations of the statute, the court determined that the language and legislative history do not support petitioner's construction. Finding "no reason why Congress might have wanted to carve out unit determinations from the grant of rulemaking power in section 6 and no indication beyond the ambiguous semantics of the word 'case' that it did want to do this," the court concluded "that unit determinations [are] not excepted from the Board's power under that section." *Id.* at 8a.

The court of appeals also held that the Board's regulation does not contravene the undue-proliferation admonition accompanying the 1974 amendments. The court noted that the industry had failed in its attempts to obtain legislation limiting the number of bargaining units in health care institutions. Pet. App. 9a. It then concluded that the admonition "is entitled to our respectful consideration, not only for its intrinsic merits but also for what light it sheds on Congress's intentions in the 1974

(1964); *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *American Fed'n of Labor* v. *NLRB*, 308 U.S. 401 (1940), or because the case was not ripe within the meaning of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-156 (1967), and its progeny. The district court rejected these contentions, determining that it had jurisdiction to pass on petitioner's challenges to the regulation and that the immediate impact of the regulation on organizational activities warranted preliminary (and later permanent) injunctive relief. The Board did not raise in the court of appeals, and does not raise here, any question of reviewability.

amendments," but is "not an amendment to section 9(b), decreeing that in the health-care industry no more than three separate bargaining units shall be authorized." *Id.* at 12a. The court added that the admonition would not foreclose the Board's eight-unit regulation "even if it were a statute, rather than a statement in committee reports" (*ibid.*). Finding that concern over proliferation had focused on "finer divisions of the health-care work force than attempted in the rule under challenge" (*id.* at 14a), the court determined that "neither the cases cited in the admonition nor the admonition itself reads on the issue of the propriety of eight units" (*id.* at 13a).

Finally, the court rejected petitioner's contention that the Board's regulation "is arbitrary because it lumps together hospitals of different sizes and missions in different locations" (Pet. App. 14a). The court observed that the very nature of a regulation is to make "one or a few of a mass of particulars legally decisive, ignoring the rest"; the "result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice" (*id.* at 15a). Here, the court continued, the Board considered alternatives to the regulation it had chosen and "gave plausible reasons for its choice." *Id* at 16a. The court added that the "decision how complex to make a rule—that is, how many exceptions to recognize—is judgmental," and it "is not for [courts] to fine-tune the regulatory process by telling the Labor Board that its rule should make slightly more distinctions than it does, or slightly fewer." *Ibid.* The court concluded (*ibid.*):

> The Board did a responsible job of weighing the conflicting arguments, and we therefore uphold its rule without pretending that we consider it Utopia.

The court of appeals subsequently granted petitioner's motion to stay issuance of the mandate pending the filing and disposition of a petition for certiorari. During the 15-

month period that implementation of the regulation has been enjoined, the Board has deferred action on all representation petitions seeking elections in units where the outcome would be affected by the regulation.

ARGUMENT

1. Sixteen years after Congress extended the NLRA to include nonprofit hospitals, the appropriate scope of health care bargaining units in those institutions remains unsettled. After its efforts to formulate doctrinal solutions to these issues had been rejected in numerous, often conflicting, decisions by courts of appeals, the Board acted decisively to end this uncertainty by promulgating a regulation establishing bargaining units in a specified category of health care facilities. Based on the information obtained in the rulemaking proceeding, the Board concluded that bargaining units for acute care hospitals should be established by general rule; that the eight units specified in its regulation would effectuate the right of employees in acute care hospitals to organize and bargain collectively without resulting in undue proliferation or associated evils; and that, save in extraordinary circumstances (for instance, a unit of five or fewer employees), these eight units were the units appropriate in all acute care hospitals.

For essentially the reasons stated in the court of appeals' decision, we believe that the Board acted within the scope of its authority in promulgating the regulation and that application of the regulation to all acute care hospitals cannot fairly be characterized as arbitrary or capricious. As petitioner acknowledges (Pet. 13), Section 9(b)'s provision that the Board determine the appropriate bargaining unit "in each case" does not preclude the Board from establishing rules of decision to be applied in those cases—either in the course of adjudications or through rulemaking. Within broad limits, the choice between rule-

making and adjudication and the specificity of the rules governing bargaining unit determinations are matters within the Board's discretion. See, *e.g.*, *Packard Motor Car Co.* v. *NLRB*, 330 U.S. at 491; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293-295 (1974). See also *Heckler* v. *Campbell*, 461 U.S. 458 (1983); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 40 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). The regulation at issue falls well within the boundaries of that discretion.

Nor does the admonition accompanying the 1974 amendments provide any basis for invalidating the Board's regulation. The admonition was not enacted into law and does not, therefore, limit the scope of the Board's rulemaking authority. Even if that were not so, the admonition would mandate only "due consideration" of proliferation of bargaining units. The Board's painstaking attention to this issue in the rulemaking proceeding—attention prompted not only by the concern expressed in the admonition, but also by the Board's "own view of what is appropriate in the health care industry," *NPR II*, 53 Fed. Reg. at 33,905—forecloses any claim that the Board's consideration of the issue of proliferation has been insufficient. See pp. 7-9, *supra*. Further, as the court of appeals noted, the units to which the admonition referred were narrower and thus more numerous than those contemplated by the Board's regulation. See Pet. App. 12a-14a.

Finally, the decision to apply the regulation to all facilities falling within the regulation's definition of "acute care hospital" is amply supported by the administrative record and is not arbitrary and capricious. In the course of the rulemaking proceeding, the Board eliminated a proposed 100-bed limitation on its regulation in response to industry criticism and added an express exception for bargaining units with five or fewer employees. The Board refined its definition of "acute care hospital" and excluded certain

categories of facilities—nursing homes, psychiatric hospitals, and rehabilitative facilities—in recognition of distinctions between these institutions and hospitals covered by the regulation. The "extraordinary circumstances" exception remains available to institutions capable of demonstrating that considerations not addressed in the rulemaking proceeding warrant a departure from the units specified by the regulation. The regulation was amply justified and explained.

2. While we believe that the court of appeals' decision is correct, we do not oppose review of that decision in this Court. It is critical to the administration of the Act and to labor-management relations in the many acute care hospitals covered by the Act that the validity of the Board's regulation be definitively resolved at the earliest possible date. As one commentator has aptly observed, this area has been characterized by a "conceptual World War I that has prevented stable rules from emerging." 4 T. Kheel, *Labor Law* § 14.03[7] (1989). Absent prompt review by this Court, it is inevitable, as petitioner asserts (Pet. 11, 29-30), that the regulation will be challenged in other circuits, through district court suits and by way of defense to Board bargaining orders issued in individual cases.[11] This additional litigation would exact a heavy toll on the resources of the courts, the Board, and the parties. In particular, employees in acute care hospitals who seek to exercise their rights to organize and bargain collectively

[11] In our view, petitioner's members would be collaterally estopped from relitigating issues decided in this case. See *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, !411 (D.C. Cir. 1984) (and cases cited therein). However, the extent to which members of an association may be subject to collateral estoppel in these circumstances is not fully settled, see 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4456 (1981 & 1990 Supp.), and, in any event, the Board's regulation would be subject to challenge by hospitals that are not members of petitioner.

through representatives of their own choosing—activities that Congress concluded in 1974 would advance not only the interests of employees, but of patients as well—will be forced to bear additional delay and expense.

Moreover, reasoning in prior decisions of other courts of appeals is inconsistent, at least in principle, with the Seventh Circuit's decision to uphold the Board's regulation. The Seventh Circuit has effectively held that the admonition accompanying the 1974 amendments does not foreclose a decision to employ rulemaking; that the Board satisfied the concerns underlying the admonition in its extensive rulemaking proceeding; and that the admonition refers in any event to bargaining units that are smaller and more specialized than those recognized in the Board's regulation. Pet. App. 13a. By contrast, certain decisions of the Ninth and Tenth Circuits suggest that the admonition requires consideration of the particular facts of each proposed bargaining unit. In *NLRB* v. *St. Francis Hospital*, 601 F.2d 404, 416 (1979), the Ninth Circuit stated that the "due consideration" referred to in the admonition "demands individual examination by the Board, or its delegate, of the circumstances of each particular case in order to determine the propriety of the proposed unit in light of the congressional directive and the public interest." The Tenth Circuit, in *Presbyterian/St. Luke's Medical Center* v. *NLRB*, 653 F.2d 450, 457 (1981), ruled that "any use of a presumption which casts upon [the hospital] the burden of producing evidence of the inappropriateness of the unit violates Congress' directive of nonproliferation in the health care industry." Moreover, the decisions in both *St. Francis* and *Presbyterian/St. Luke's* held that the 1974 admonition obligates the Board, in health care institutions, to select the broadest possible units—excluding only those employees with disparate interests. 601 F.2d at 419; 653 F.2d at 457-458 n.6. The approach that the Board followed in formulating its regulation (see *NPR II*, 53 Fed. Reg. at 33,904-33,906) might be regarded as inconsistent with that model.

* * * * *

The questions presented in the petition raise issues appropriate for consideration by this Court. And in our view, the Court's consideration would not benefit from further litigation in the courts of appeals. Accordingly, we do not oppose review of the court of appeals' decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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